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Nos. 88-429 and 88-494

In the Supreme Court of the United States

OCTOBER TERM, 1988

WASHINGTON LEGAL FOUNDATION, APPELLANT

v.

UNITED STATES DEPARTMENT OF JUSTICE, ET AL.

PUBLIC CITIZEN, APPELLANT

v.

UNITED STATES DEPARTMENT OF JUSTICE, ET AL.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MEMORANDUM FOR THE FEDERAL APPELLEE

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MEMORANDUM FOR THE FEDERAL APPELLEE

Appellants Public Citizen and Washington Legal Foundation (WLF) have appealed the district court's judgment that the application of the Federal Advisory Committee Act (FACA), 5 U.S.C. App. 1-14, to the American Bar Association Standing Committee on Federal Judiciary violates Article II of the Constitution and the separation of powers doctrine by interfering with the President's ability to obtain confidential advice about the qualifications of potential nominees to the federal bench.

1. a. The President is responsible for nominating the Justices of the Supreme Court and the judges of the lower

federal courts. In deciding on such nominations, the President relies on advice from a federal judicial selection committee composed of several senior officials at the White House and the Department of Justice. J.S. App. 5a.[1] As part of the process of advising the President, for the last 36 years the Justice Department has confidentially provided the names of potential nominees to the American Bar Association Standing Committee on Federal Judiciary (ABA Committee) to obtain its opinion of potential nominees' qualifications.

The ABA Committee is a private entity consisting of 14 members drawn from the 328,000-member American Bar Association, which is also a private organization. J.S. App. 4a. At the Department's request, a potential judicial nominee completes a questionnaire designed by the ABA Committee and submits it to the Assistant Attorney General for the Office of Legal Policy, to the Chair of the ABA Committee, and to the Committee member who represents the relevant federal judicial circuit. *Id.* at 5a-6a. Using the answers to this questionnaire, a committee member (ordinarily, the ABA Committee circuit representative) examines the candidate's legal writings and interviews a sample of state and federal judges, lawyers, and law professors in the potential nominee's community, as well as members of professional organizations and other groups interested in the nomination process. *Id.* at 6a; *American Bar Association Standing Committee on Fed-*

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[1] This committee consists of the Attorney General; the Counsel, Deputy Counsel, and Associate Counsel to the President; two Presidential Assistants; the Director of Presidential Personnel; the Deputy Attorney General; the Counselor to the Attorney General; and the Assistant Attorney General and Deputy Assistant Attorney General for the Office of Legal Policy. 88-429 J.S. App. 5a n.10. (Unless otherwise noted, all references to J.S. App. will be to the appendix to the jurisdictional statement in No. 88-429.)

eral Judiciary: What It Is And How It Works 6 (1983) [hereinafter *ABA Committee*]. During this process, the potential nominee meets with one or more members of the ABA Committee. *Ibid.* All details of the review process are kept confidential. J.S. App. 6a & n.20.

After that investigative process is completed, the ABA Committee representative prepares for the Chair an informal written report, which includes a summary of the candidate's background, a summary of all interviews (including the interview held with the candidate), an evaluation of the candidate's qualifications, and a recommended rating. *ABA Committee* 6. The Chair then provides the Justice Department with an informal evaluation of the candidate, and the Chair passes along the substance of the report with a tentative rating, both of which are confidential. *Ibid.*; J.S. App. 6a. If the Justice Department so requests, a formal report on the candidate is prepared, and the full ABA Committee is polled on the candidate's rating. The Chair then reports the Committee's final rating to the Justice Department and indicates whether it is unanimous. *ABA Committee* 7. On some occasions, Justice Department officials discuss with the ABA Committee the initial evaluation and rating. See Declaration of Steve A. Matthews 4 (Dec. 18, 1986); *Confirmation Hearings on Federal Appointments: Hearings Before the Senate Comm. on the Judiciary,* 98th Cong., 2d Sess., Pt. 3, at 272-275 (1984). The reasons for the final rating are sometimes revealed to the Justice Department, although the ABA Committee's sources and internal report remain confidential. J.S. App. 6a n.20.[2] Finally, after considering the ABA Committee rating along with other informa-

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[2] If the candidate is nominated, the ABA Committee rating is disclosed during the Senate confirmation hearings. J.S. App. 7a.

tion gathered by the government and submitted by the candidate, the Attorney General recommends to the President whether a candidate should be nominated for the federal bench. *Id.* at 7a.

b. The FACA, 5 U.S.C. App. 1-14, was enacted in 1972. It imposes various requirements on advisory committees that are "established by statute or reorganization plan," or that are "established or utilized by the President" or (with certain exceptions) "one or more [Executive Branch] agencies." 5 U.S.C. App. 3(2)(A), (B), and (E). For example, a charter describing the committee's objectives and operations must be prepared before the committee can meet and take action. 5 U.S.C. App. 9(c). For advisory committees utilized by the Executive Branch, the statute requires, among other things, that there be timely notice of the committee's meetings and that, subject to a provision of the Government in the Sunshine Act, 5 U.S.C. 552b(c), committee meetings be open to the public. Interested parties must also be allowed to appear before or file statements with the committee. 5 U.S.C. App. 10(a)(3). Advisory committees must keep detailed minutes and transcripts of their meetings, and, subject to the provisions of the Freedom of Information Act, 5 U.S.C. 552, all records, transcripts, and other documents made available to or prepared for or by the committee must be available for public inspection and copying. 5 U.S.C. App. 10(b) and (c). Each advisory committee must have a designated federal officer or employee to chair or attend each committee meeting. That official has the sole power to call or adjourn committee meetings, and to approve the agenda in advance. No meetings may be held in the absence of that official. 5 U.S.C. App. 10(e) and (f).

Since 1974, the Justice Department has formally taken the position that the ABA Committee is not subject to the

FACA.[3] Accordingly, neither the Department of Justice nor the ABA Committee has followed the act's requirements in connection with the Department's consideration of candidates for the federal bench.

c. In December 1985, appellant WLF filed an action in the United States District Court for the District of Columbia against appellee American Bar Association, the ABA Committee, and various private parties, alleging that the ABA Committee is subject to the FACA and must comply with its mandates. The district court dismissed the suit, ruling that the FACA does not supply private parties with a cause of action against a private entity that is not established or financed by the federal government. *Washington Legal Foundation* v. *American Bar Ass'n,* 648 F. Supp. 1353 (D.D.C. 1986), appeal pending, No. 87-7022 (D.C. Cir.).

Shortly before that suit was dismissed, appellant WLF filed this action in the same court against appellee Department of Justice. Appellant Public Citizen subsequently intervened in this action. Both parties asserted that the FACA applies to the ABA Committee and that the government should be enjoined from obtaining that committee's advice in the judicial nomination process until the

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[3] In 1973 and 1974, the Department of Justice considered this question and applied the same two-step analysis used by the district court in this case. As an initial matter, the Department concluded that the ABA Committee was covered by the statute. After consultation with the ABA, during which the ABA expressed its unwillingness to continue to advise the President if the ABA were required to comply with the FACA, in a subsequent examination the Department further concluded that the application of the statute to the ABA in this context violated the Constitution. Among those at the Department who participated in the examination was Justice Scalia, who was serving as Assistant Attorney General in charge of the Office of Legal Counsel during part of that period.

requirements of the FACA are satisfied. Appellant WLF also sought access from the Justice Department to records of the ABA Committee. The Justice Department argued that the FACA did not apply to the ABA Committee and that, if it did, the FACA would unconstitutionally interfere with the President's ability to obtain the advice necessary to decide whether to nominate an individual to the federal bench.

In August 1988, the district court dismissed the suit. The court agreed with appellants that the ABA Committee is an "advisory committee" under the FACA and is therefore subject to its requirements. J.S. App. 7a-14a. The court agreed with the Department of Justice, however, that the application of the FACA to the ABA Committee would unconstitutionally interfere with the President's ability to obtain advice on the question whether to nominate an individual for the federal bench. *Id.* at 15a-26a.[4]

d. The judgment of the district court (J.S. App. 28a) was entered on August 4, 1988. A notice of appeal in No. 88-429 was filed on September 1, 1988 (*id.* at 29a), and the jurisdictional statement was docketed on September 9, 1988. A notice of appeal in No. 88-494 was filed on August 26, 1988 (88-494 J.S. App. 1a-2a), and the jurisdictional statement was docketed on September 22, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1252.[5]

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[4] Appellee American Bar Association intervened in this case after the district court entered judgment.

[5] Section 1 of the Act of June 27, 1988, Pub. L. No. 100-352, 102 Stat. 662, repealed 28 U.S.C. 1252 effective September 25, 1988. § 7, 102 Stat. 664. That repeal does not affect this case, because it "shall take effect ninety days after the date of the enactment of this Act" and "shall not apply to cases pending in the Supreme Court on the effective date * * * or affect the right to review or the manner of reviewing the judgment or decree of a court which was entered before such effective date." *Ibid.*

2. The district court's holding that the FACA applies to the ABA Committee and is unconstitutional as applied presents substantial questions that should be resolved by this Court after plenary review. We therefore agree with appellants that this Court should note probable jurisdiction over the appeals in Nos. 88-429 and 88-494. Because both appeals present the same questions, they should be consolidated in this Court.[6]

Respectfully submitted.

CHARLES FRIED
Solicitor General

NOVEMBER 1988

[6] In the earlier suit involving appellant WLF and the ABA Committee, *Washington Legal Foundation* v. *American Bar Ass'n*, *supra*, the district court considered the question whether appellant WLF had standing to challenge the ABA Committee's noncompliance with the FACA. We will address that question and other related preliminary matters in our brief on the merits.

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